



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 26, 2015

Dr. Edna V. Baehre-Kolovani
President
Tidewater Community College
121 College Place
Norfolk, Virginia 23510-1938

Re: OCR Complaint No. 11-15-2027
Letter of Finding

Dear Dr. Baehre-Kolovani:

This letter is to inform you of the disposition of the complaint that was filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department) against Tidewater Community College (the College) on November 26, 2014. In the complaint, the Complainant alleges that the College discriminated against her on the basis of disability (visual impairment) and retaliated against her. Specifically, OCR opened for investigation the following allegations:

Allegation 1: The College discriminated against the Complainant on the basis of disability during the fall 2014 semester when her Geology lab instructor (the Instructor) failed to provide her with academic adjustments and auxiliary aids, including large print or enlarged instructional materials and tests, consistent with her accommodations plan; and

Allegation 2: The Instructor retaliated against the Complainant by ceasing to communicate with her after she complained to College personnel about his failing to implement her accommodations plan.

In investigating this complaint OCR reviewed the complaint, and information provided by the Complainant and the College. Additionally, OCR interviewed the Complainant, College staff, and other students who participated in the same lab course.

Following its investigation, OCR found insufficient evidence of retaliation as alleged in the complaint. However, OCR did find sufficient evidence of non-compliance in regards to Allegation 1. Additionally, in the course of investigating this complaint, OCR identified concerns with the College's Section 504 student complaint/grievance procedures. The College has agreed to take action to address the concerns identified, as set forth in this letter and in the enclosed resolution agreement (the Agreement). The provisions of the Agreement are aligned with the allegations raised in the complaint and information obtained during the course of OCR's

investigation and are consistent with the applicable regulations. OCR will monitor the Agreement, which when fully implemented will resolve the compliance issues identified with respect to this allegation. An explanation of our analysis and conclusions follows.

OCR's Jurisdiction

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by a public entity. Because the College is a recipient of federal financial assistance from the Department and is a public entity, it is subject to the requirements of Section 504, Title II, and their implementing regulations.

Background

During the fall 2014 semester the Complainant was enrolled in a XXXX at the College. The Complainant has a number of medical conditions including a visual impairment. She was registered with the College's Office of Educational Accessibility (Disability Services) to obtain academic adjustments and auxiliary aids related to her disabilities. Disability Services staff completed an *Academic Accommodations Form (Accommodations Form)*, which the Complainant shared with the lab instructor. The auxiliary aids and services that Disability Services determined to be appropriate for the Complainant include: large print handouts for classroom activities using specified typeface; oral statements for information written on blackboards or on overhead transparencies, or enlarged transcription; enlarged copies of overhead transparencies and/or *PowerPoint* presentations prior to the class in which they are used; a copy of instructor's lecture notes where available; allow marking answers directly on the enlarged tests rather than answering sheets even if sheets have been enlarged; provide large print tests and exams or allow the student to take materials to the library where the visual enlarger is located; and allow the student to turn in her written assignments in specified and enlarged typeface.

On October 29, 2014, the Complainant complained to the Coordinator of Educational Accessibility (the Coordinator) that she was unable to see topographical maps for an upcoming test. The Coordinator contacted the instructor and began attempting to resolve the Complainant's concerns. On November 3, 2014, the Complainant informed the Coordinator that she was unable to complete her lab test on topographical maps because she could not see the slides projected on the overhead projector used for the test. She reported that the attempt by the instructor to assist her in class by providing her with a magnifying glass was not effective. On November 17, 2014 while testing was underway, the Complainant asked the instructor to enlarge her test. The instructor had his lab assistant do so.

The Coordinator, in an attempt to address the Complainant's concerns, determined with the instructor's agreement, that the Complainant would be allowed to re-take her November 3, 2014

lab test utilizing a closed circuit television (CCTV), which can enlarge any text needed to be adjusted. The Coordinator would proctor the test re-take to ensure the appropriate auxiliary aids were implemented. The Complainant was unable to re-take the test on the agreed upon date and chose not to re-take the test at a subsequently scheduled time (i.e., November 25, 2014). Instead on November 24, 2014, she met with the Dean of Students informing him of the difficulties in obtaining auxiliary aids in the course and told him she could not re-take the test because she could not understand the material due to the lack of accommodations. The Dean followed up with the Coordinator notifying her of his meeting with the Complainant and the concerns she had raised.

In attempt to remedy the situation, and with the Complainant's agreement, the Coordinator reported that as an alternative to testing, the instructor would assign the Complainant two papers on topographical maps. In addition, the instructor told OCR that although pre-lab assignments were due before the start of each class, he gave the Complainant full credit for the five out of nine pre-lab assignments she submitted, which OCR was able to confirm by reviewing her academic records. The Complainant's final grade in the lab portion of the course was 72.52 (C). She earned a C overall in the Geology course.

Allegation 1: Failure to provide auxiliary aids

Legal Standards and Analysis

The Section 504 regulation, at 34 C.F.R. §104.43(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any postsecondary education program of a recipient. The Title II regulation, at 28 C.F.R. §35.130(a), contains a similar prohibition applicable to public postsecondary educational institutions.

Under the Title II regulation, at 28 C.F.R. §35.130(b) (1) (ii) and (iii), public colleges and universities may not afford a qualified individual with a disability opportunities that are not equal to those afforded others, and may not provide aids, benefits or services that are not effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

Under 28 C.F.R. §35.130(b)(7), public colleges and universities must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program or activity. Section 35.103(a) provides that the Title II regulation shall not be construed to permit a lesser standard than is established by the Section 504 regulation.

The Title II regulation, at 28 C.F.R. §35.160(a), requires a public college or university to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. The regulation at 28 C.F.R. §35.160(b)(1) further requires a public college or university to furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.

Communication is construed broadly to mean the transfer of information. In determining whether communication is as effective as that provided to non-disabled persons, OCR looks at the timeliness of the delivery, the accuracy of the communication, and whether the manner and medium used are appropriate to the significance of the message and the abilities of the individual with a disability. Additionally, in accordance with Title II, because the College is a public institution, the implementing regulation 28 C.F.R. §35.160(b) (2) requires that the college or university give primary consideration to the requests of the individual with disabilities when determining what type of auxiliary aid and service is necessary.

The Complainant alleged that the College failed to provide the necessary auxiliary aids (specifically enlarged text and related assistance due to vision impairment) in her geology lab course. As stated previously, the Complainant was registered with the College as a student with a disability and received approval for auxiliary aids through an *Accommodations Form*. The agreed upon auxiliary aids and services to be provided were consistent with the Complainant's preferred method of communication.

The instructor told OCR that the Complainant had presented her *Accommodations Form* to him at the beginning of class and walked away. He said that he had signed and returned it to her, but that they did not discuss its content. A copy of the *Accommodations Form* provided to OCR by the Complainant shows that the instructor signed the Form on September 24, 2014, approximately one month after the first lab course.

The instructor recalled that the Complainant's form included a long list of accommodations. He told OCR that while he tries his best to provide the necessary accommodations, due to the size of his classes, he relies heavily on student feedback. He said that he made general announcements to all the students in the XXXX lab class telling them to let him know if their needs were not being met. He told OCR that he did not receive any feedback from the Complainant prior to October 29, 2014 as to what accommodations she needed.

The Complainant claims that she did not receive enlarged class handouts consistent with her *Accommodations Form*, which entitles her to "large print handouts for classroom activities." According to the instructor, all materials handed out to the students came from the Geology lab manual. The instructor reported it was his understanding that the Coordinator had been working to provide enlarged materials for the Complainant. The Coordinator told OCR that she enlarged portions of the Geology lab manual once the Complainant provided it to her mid-way through the semester. She said, however, that upon being notified by the Complainant about the difficulties in accessing other materials for the lab, she offered to the instructor, consistent with the Complainant's *Accommodations Form*, to have Disability Services staff enlarge class handouts, tests, and answer sheets. According to the Coordinator, while the instructor responded, "okay" to her offer to enlarge text, he never did request assistance from Disability Services to provide the Complainant with enlarged text materials.

According to the instructor, once he received notice from the Coordinator on October 29, 2014, that the Complainant was experiencing difficulties in accessing the written materials due to a vision problem, the instructor attempted to accommodate the Complainant by allowing her to use a magnifying glass. The Complainant reported to the College and to OCR that this did not prove

to be effective. The instructor confirmed to OCR that on November 17th the Complainant requested during the testing period that she receive an enlarged version of the test. While an enlarged version of the test was provided, the length of time it took to produce it is in dispute.¹

Additionally, the instructor told OCR he had assisted the Complainant during the instructional portion of the class by trying to lecture close to where the Complainant was seated, pointing out specific important information, while still circulating around the class and assisting others. He reported that he afforded the Complainant, just as she afforded everyone else in the class, an opportunity to come up to the computer after the lecture to review any overhead slides he had projected during the lecture. It is not clear, however, how this practice would have assisted the Complainant in seeing the slides projected during tests. The instructor also said on multiple occasions he announced to the class as a whole that if anyone needed help with anything in class, they should let him know.

In early December, the Coordinator and the instructor attempted to remedy the Complainant's immediate concerns regarding the Topography tests by allowing the Complainant to write two papers on the Topography materials. However, this attempt to remedy did not adequately account for the lack of enlarged text materials in the didactic portion of the class and the impact this deficiency had on the Complainant's ability to access the educational program. The failure to provide necessary auxiliary aids, including those for instructional materials, presumably negatively impacted the instructional foundation. Allowing the Complainant the opportunity to write two papers on Topography without affording her the necessary auxiliary aids to provide her equal access to the instructional materials as compared to students without a disability was not an effective academic adjustment or auxiliary aid as required by Section 504.

OCR's investigation finds sufficient evidence that the College failed to provide the Complainant enlarged text and handouts utilizing her preferred method of communication, which had been incorporated into her *Accommodations Form*. OCR notes that the Instructor did make efforts to provide other accommodations, including providing the Complainant a magnifying glass; speaking close to where the Complainant was sitting; and providing the Complainant the alternative to write papers instead of taking exams; however, these were not the agreed upon auxiliary aids required for effective communication.

This failure resulted in a denial of the provision of equally effective communication and had the effect of denying the Complainant an equal opportunity to participate in, and enjoy the benefits of the course as compared with non-disabled students. The enclosed Agreement addresses this concern.

¹ According to the Complainant, it took between 30- 40 minutes to receive an enlarged version of the test. She said that by that time, the other students had largely completed the test so that she ended up taking it while the instructor was instructing the class on something new. The instructor's recollection was that it took between seven to eight minutes to enlarge the test and that the Complainant completed it in the same time period as other students.

Section 504 Grievance Procedures

In the context of investigating the Complainant’s allegations, OCR reviewed and identified several concerns with the College’s grievance procedures, as described below.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient that employs fifteen or more persons adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging discrimination based on disability in violation of Section 504.

Generally, when determining whether a recipient’s procedures provide for “prompt and equitable” resolution of such complaints, OCR considers the following factors: notice to potential grievant of the procedure, including where complaints may be filed; application of the procedure to complaints alleging discrimination; an adequate, reliable, and impartial investigative process, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for the major stages of the complaint process; and notice to the parties of the outcome of the complaint. While not expressly required, it also is recommended that such procedures incorporate a prohibition against retaliation. Moreover, where procedures provide for an appeal, there should be reasonably prompt timeframes for the appeal process.

The College has an Equal Opportunity and Nondiscrimination policy (Policy 2100) which prohibits illegal discrimination as described in various civil rights laws, including those related to disability discrimination. The Policy provides for a related Student Complaint Procedure (the Procedure) through which an “active student” can raise and seek to resolve a disability-related concern.² However, while the Procedure states that students may file against any employee or employees under contract to the College, it does not state or point to a related procedure on how a student can file a complaint against another student or a third party. According to the Executive Vice President and Dean of Students, complaints against another student alleging harassment, for example, could be made under the Student Code of Conduct (Code) Judicial Affairs process. Section 3.2.21 of the Code prohibits harassment based on various legally protected categories, including disability. There is no link or reference from the Procedure to the Code process. Finally, it is not apparent under which procedure a student could file a complaint against a third party.

The Procedure states if at the end of an investigation into a student complaint the evidence shows misconduct then the matter is referred to the appropriate authority for a misconduct investigation. However, the Procedure does not delineate which office(s) nor does it identify the potential outcome or remedy. While College staff confirmed that interim measures would be put in place pending the completion of an investigation, including through the pendency of a “misconduct” investigation, a student is not provided notice of this practice as it is not described in the Procedure.

² The procedure states that an individual is considered “active” for two years after their initial admission or readmission to the College or most recent enrollment, including in a non-credit course, whichever is later. The College has a separate employment grievance procedure, which also includes review of allegations of disability discrimination.

OCR was informed by the Executive Vice President that if a student is seeking a change in grade as a remedy the student must utilize the College's grade appeal process, even if the alleged reason for making such a request is based on discrimination.³ The Executive Vice President explained to OCR that in the event that a student files a complaint utilizing the Procedure and the investigation reveals discrimination which resulted in what the student considers to be an unfair grade, then the student would use the Nondiscrimination student complaint finding to support a request for a grade change through the grade appeal process. While this may be the College's practice, it is not described in the student complaint or grade appeal process, which is problematic. OCR is concerned that students seeking to utilize the Procedure are not provided with enough information to make a meaningful choice among the various options or enough information to know whether one option might be more beneficial.

The Procedure identifies other external agencies with which a student might file a complaint, including the Office for Civil Rights, and provides a link to OCR's website. According to the Dean of Students and the Executive Vice President, the Procedure notes that the College will terminate its investigation into a student complaint if the College subsequently learns that a formal complaint has been filed with an external agency. The Executive Vice President reported to OCR that despite termination of any internal investigation, the College would put in place interim measures or, in the case of disputed disability-related aids and services, would put in place the necessary auxiliary aids. However, the provision of interim measures is not specifically stated in the College's Procedure, nor is it evident how the College would determine what services, if any, were required and how it would remedy any ongoing discrimination, if its practice is to close an investigation upon notice of an external complaint. Moreover, the College's practice of terminating its own investigation due to a subsequently filed external complaint may not always be appropriate in light of the College's independent obligation to identify possible discrimination, take steps to stop it, and prevent its recurrence.

Finally, OCR notes that it is considered good practice to assure confidentiality of the complaint process. As currently written, the student procedures do not contain an assurance that the complaint and information pertaining to it will be kept confidential. The College has agreed to take action as described in the enclosed Agreement, which will address the concerns noted.

Allegation 2: The Instructor retaliated against the Complainant by ceasing to communicate with her after she complained to College personnel about his failing to implement her accommodations plan.

Legal Standards and Analysis

The regulations implementing Section 504, at 34 C.F.R. §104.61, and Title II, at 28 C.F.R. §35.134(a), prohibit colleges from retaliating against any individual for engaging in a protected activity. When analyzing a claim of retaliation, OCR will look at the following three elements to determine if the Complainant has stated an initial case: 1) whether the complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a

³ In this case the Complainant did file a grade appeal. She included in her documentation submitted to support her request for a grade change that the basis for her appeal was because the instructor did not provide her with the required "accommodations." The College provided OCR a copy of the final determination on the grade appeal. The appeal was denied.

law enforced by OCR); 2) whether the College took a materially adverse action against the complainant; and 3) whether there is some evidence that the College took the adverse action as a result of the complainant's protected activity. If all these elements are present, this establishes an initial or *prima facie* case of retaliation. OCR then determines whether the College has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the College's reason for its action is a pretext or excuse for unlawful retaliation.

OCR first considered whether the Complainant engaged in a protected activity and determined that she had. On October 29, 2014, the Complainant met with the Coordinator and complained that she was having difficulty in the GOL 105 Lab because she could not see the classroom materials for an upcoming test. The Coordinator contacted the Instructor to explore what could be done to accommodate the Complainant for the upcoming test. The Complainant also raised her concerns directly with the GOL 105 Lab instructor in an email dated November 5, 2014, stating "You have not accommodated me so that I can see what you are teaching." By asserting her entitlement to accommodations in GOL 105 Lab, the Complainant engaged in a protected activity.

OCR next examined whether the alleged failure of the instructor to communicate with the Complainant could constitute an adverse action. To be considered adverse, an action must cause a lasting and tangible harm or must be sufficient to discourage a reasonable person from future protected activity. The Complainant indicated that after she complained about the instructor failing to provide her with accommodations, the instructor ignored her by refusing to check the pre-lab work that she presented to him. In addition, she said that he ignored an email that she sent to him complaining about the lack of accommodations. An instructor's ignoring a student's attempt to raise awareness of her need for accommodation; failing to provide accommodations to a student; or failing to acknowledge a student's completed work could result in harm in diminished academic performance or otherwise dissuade a student from asserting her rights in the future. Therefore, OCR will assume for the sake of analysis that the alleged treatment of the instructor toward the Complainant could constitute an adverse action. In addition, since the alleged adverse actions occurred shortly after the Complainant first complained to the Coordinator about the lack of accommodations on October 29, 2014, OCR will assume an apparent causal relationship between the protected activity and those actions.

Assuming *arguendo* that the Complainant met all three elements of the initial case for retaliation, OCR considered whether the College had a legitimate, non-retaliatory motive for the alleged adverse treatment and whether that motive was pretextual. The instructor acknowledged that his interactions with the Complainant changed as the semester progressed. The instructor said that he went out of his way to teach from the area where the Complainant sat so that he could provide additional assistance, but maintains that as the semester progressed the Complainant chose to limit her interactions with him and acted as if she wanted nothing further to do with him. The instructor denied that he had ever ignored the Complainant, including when she presented lab work to him. In fact, he put a placeholder in his grade book for work the Complainant did not submit on time and allowed her to submit the work late for full credit. She was given full credit for the five pre-labs that she submitted.

The instructor told OCR that after they started on Topography the Complainant began "put up a wall" and preferred not to deal with him. For example, she began to get up and leave

immediately after the lecture portion of the lab class. She also asked the Coordinator to submit work to the instructor on the Complainant's behalf.

In addition, although the instructor did not directly respond to the Complainant's November 5th email to him, he forwarded the email to the Coordinator and worked closely with the Coordinator to address the Complainant's concerns. As discussed above, the instructor attempted to accommodate the Complainant during the lab class by providing her with a magnifying glass, offering her the opportunity to view the slides up close on his monitor, and lecturing near the Complainant to point out important information. He also worked with both the Complainant and the Coordinator to facilitate the Complainant's participation in a class field trip in early November. The instructor told OCR that he sensed that the Complainant's stress level was high toward the end of the semester and made it clear to the Coordinator that the Complainant, who was allowed to write two papers in lieu of a test and final exam, did not need to attend the remaining classes.

The Coordinator corroborated that the Complainant grew increasingly uncomfortable interacting with the instructor, that the Complainant would walk out of class at the end of the lecture, and that she and the Complainant agreed that the Coordinator would serve as a liaison between the two. Thus, to the extent that the level of interaction between the Complainant and instructor changed during the semester was a result of the Complainant's efforts to limit those interactions, the College has articulated a legitimate, non-retaliatory reason for that change.

OCR considered whether there was any indication that the reason articulated by the instructor was a pretext for retaliation. OCR reached out to all the other students who were in the same GOL 105 lab class with the Complainant. Those who responded confirmed that the instructor would walk up to the Complainant or station himself in close proximity to her table to explain things to her directly or answer her questions. They never observed the instructor ignoring the Complainant or treating her negatively. They noted that the Complainant initially tried to do the lab work but became increasingly frustrated and less engaged in the class as the semester progressed. One student recalled that on one occasion when the instructor attempted to explain something to the Complainant, she responded in an exasperated manner. On another occasion, she allegedly threw her books down "in a huff." They confirmed that the Complainant became increasingly less engaged in the class and would leave immediately following the lecture portion.

OCR found no indication that the instructor's interactions with the Complainant were in response to her having reported that he had failed to accommodate her. Rather as noted by instructor and confirmed by the Coordinator and other students, the Complainant's somewhat distanced interactions with the instructor and increasing lack of engagement in class appeared to stem from her own frustration. While the Complainant's frustration may have been due to the College's failure to provide the effective auxiliary aids, as described above, OCR found insufficient evidence to support the claim that the Instructor's actions were retaliation against the Complainant as alleged.

Conclusion

As noted previously, with regard to the issue raised in Allegation (1) and the concerns regarding the College’s Section 504 student complaint/grievance procedures, the College entered into the enclosed resolution agreement (the Agreement). OCR will monitor the College’s implementation of the Agreement.

This concludes OCR’s investigation of this complaint. OCR is closing this complaint investigation effective the date of this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of OCR case resolution, the individual may file a complaint alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, information that, if released, could constitute an unwarranted invasion of personal privacy.

OCR appreciates the cooperation shown by College staff, most notably Mr. Frank Dunn, Executive Vice President. If you have any questions, feel free to contact the OCR attorneys assigned to this complaint, namely Josie Evola at (202) 453-5908 or josie.evola@ed.gov or Betsy Trice at (202) 453-5931 or betsy.trice@ed.gov.

Sincerely,

/S/

Michael Hing
Supervisory Attorney
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Mr. Frank Dunn, Executive Vice President (via email)